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NO.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

SYSTEMS ARCHITECTS, INC.,
KAREN PAN, and GEORGE PAN,
Petitioners

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Boston, MA 02110
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QUESTION PRESENTED

1. Must the trier of fact in a judge trial, as in a jury trial, keep an open mind and deliberate as to guilt or innocence only at the conclusion of the trial in order to meet the requirements of due process of law and the right to counsel?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....6

CONCLUSION.....10

APPENDIX.....A-1

TABLE OF AUTHORITIES

Cases	Page(s)
Herring v. New York, 442 U.S. 853 (1975)	6,8
In re Murchinson, 349 U.S. 133 (1955)	8
United States v. Brotherton, 427 F.2d 1286 (8th Cir. 1970)	9

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the petitioners' convictions after a jury waived trial in the United States District Court for the District of Massachusetts is reported as United States v. Systems Architects, Inc., 757 F.2d 373 (1st Cir. 1985). It is set out in the Appendix, infra., pp. A- 3 to A- 20.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on February 22, 1985. The order denying the timely filed Petition for Rehearing on behalf of petitioners Systems Architects, Inc. and George Pan was entered on May 20, 1985. This petition has been filed within sixty days of that date, as required by Rule 20 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On September 29, 1983 a grand jury sitting in the District of Massachusetts returned a 55 count indictment against Systems Architects, Inc., George Pan and Karen Pan.

On April 19, 1984 the government moved to dismiss 38 counts and renumber the remaining 17 counts.

The renumbered indictment consisted of two mail fraud counts in which each defendant was named; one false claim count in which each defendant was named; and fourteen false statement counts, in which George Pan and SAI were named in all, and Karen Pan was named in eight.

The defendants were tried before the Honorable Judge Skinner sitting without a jury from April 20, 1984 to May 23, 1984.

Complex evidence was heard for fifteen days in this case. Five days after the close of the evidence lengthy closing arguments were made by the prosecution and by the three defense counsel. Immediately after the last closing argument, the court found the defendant SAI guilty on all eleven counts, the defendant George Pan guilty on ten counts and not guilty on one count, and the defendant Karen Pan guilty on three counts and not guilty on two counts.

The Court thereby failed in its duty to deliberate and violated the defendants' constitutional rights.

The defendants seasonably perfected their appeals to the First Circuit. The First Circuit affirmed the judgments of conviction holding that there was no duty to deliberate at the conclusion of the trial.

REASONS FOR GRANTING THE WRIT

This is a case of first impression in the federal judicial system. The First Circuit could cite no case in favor of its position that in a judge trial, as opposed to a jury trial, the trier of fact does not have to keep an open mind and deliberate as to guilt or innocence only at the conclusion of the trial.

In Herring v. New York, 442 U.S. 853, 863 n.15 (1975), the Supreme Court in rejecting the development of a distinction between jury waived and jury trials on the issue of closing arguments said:

> The contention has been made that, while a right to make closing argument should be recognized in a jury trial, there is insufficient justification for such a right in the context of a bench trial. This view rests on the premise that a

> judge, with legal training and experience, will be likely to see the case clearly, rendering argument superfluous, or to recognize that further illumination of the issues would be helpful, in which case he would permit closing argument.
>
> We find this contention unpersuasive. Judicial training and expertise, however it may enhance judgment, does not render memory of reasoning infallible. Moreover, in one important respect, closing argument may be even more important in a bench trial than in a trial by jury. As Mr. Justice Powell has observed, the "collective judgment" of the jury "tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decision making process of a jury.

Unless the trial judge is required to deliberate on the information and theories advanced in closing arguments,

the defendant's right to make a closing argument is eviscerated. Justice must satisfy the appearance of justice. In re Murchinson, 349 U.S. 133, 136 (1955). While it is true that a trial judge may in practice only give pro forma adherence to a requirement of deliberation; this is also true for closing argument as the dissenters pointed out in Herring. Such possible disregard for the substance of due process requirements should not undermine the establishment of due process rights.

In the case at bar the pronouncement of the twenty-seven verdicts immediately upon the last words of closing argument shows that the trial court did not deliberate at all upon the theories advanced in the closing arguments of the defense, but had made its decision prior

to argument. Given the complexity of the issues in the case, it was not possible for the trial court to give due consideration to the arguments of counsel without some period of deliberation.[1]

Since the decision rendered by the First Circuit has broken new ground and has far reaching policy implications concerning jury waived trials petitioners' writ should be granted.

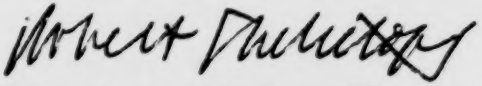
---

1. Although cases hold that there is no rule in jury cases that requires a jury to deliberate for any particular period of time, those cases premise their decisions on the principle that some deliberation is required and consider whether the amount of time spent in jury deliberation was appropriate to the issues to be decided. E.g. United States v. Brotherton, 427 F.2d 1286, 1289 (8th Cir. 1970) (affirmed conviction of transporting a stolen vehicle after five to seven minutes of deliberation where only issue was whether the defendant knew the motor vehicle ws stolen).

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,



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July 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1561

UNITED STATES OF AMERICA,
Appellee

v.

SYSTEMS ARCHITECTS, INC.,
Defendant, Appellant,

No. 84-1564

UNITED STATES OF AMERICA,
Appellee,

v.

KAREN Y. PAN,
Defendant, Appellant

NO. 84-1565

UNITED STATES OF AMERICA,
Appellee

v.

GEORGE S. PAN,
Defendant, Appellant

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

[Hon. Walter Jay Skinner,
U.S. DISTRICT JUDGE]

Before
Coffin, Bownes and Torruella,
Circuit Judges.

Robert L. Sheketoff with whom Elizabeth A. Lunt and Zalkind & Sheketoff were on brief for appellants.

Jay A. Brozost with whom Morris B. Silverstein, Criminal Division, U.S. Department of Justice, and William F. Weld, United States Attorney, were on brief for appellee.

February 22, 1985

TORRUELLA, Circuit Judge.

Defendants Systems Architects Inc. (SAI), George S. Pan and Karen Y. Pan have brought this appeal of their convictions on various counts arising from an indictment charging that appellants engaged in a scheme to defraud the appellee United States (Government) by mischarging the labor hours that SAI employees worked on government contracts.[1] The mischarging was allegedly accomplished through the alteration of employees' time sheets, the

1. SAI and Karen Pan were convicted of making false statements in violated on 18 U.S.C. § 1001. George Pan was convicted on counts of mail fraud, false statements and false claims, in violation of 18 U.S.C. § 1341, 287 and 2.

charging of work done on one project to other projects, the deliberate misposting of employees' hours in the corporate accounting ledgers, and the giving of specific orders by the appellants to subordinate employees to record hours other than those the employees actually worked.

Of the original 55 counts in the indictment, 38 counts were dismissed upon motion by the Government. After the Government presented its case in the bench trial, the judge dismissed six more counts. At the conclusion of closing arguments, the judge found appellant George S. Pan guilty of ten of the remaining counts and acquitted him on one count. Karen Pan, who was charged on only five counts, was found guilty on two and acquitted on three. SAI was convicted on all eleven counts.

Appellants claim that the trial court violated their constitutional rights and Rule 23 of the Federal Rules of Criminal Procedure when it allegedly failed to obtain a proper and sufficient waiver of their right to a jury trial. We find this allegation lacking in merit.

Appellants do not claim that their waivers were not made intelligently, knowingly, and voluntarily. They take issue only with the fact that the written waiver and the coloquy on this matter did not contain specific references to voluntariness or knowledge. After a brief dialogue the day before trial, the waivers of all the appellants were approved by the judge.[2]

2. SAI asserts that its written waiver was not filed until the third day of trial. This is highly inaccurate, to say the least. Mr. Thomas Dwyer, Jr. was authorized
(footnote continued to next page)

Rule 23(a) requires that the right of jury trial be waived explicitly in writing; no reference is made to oral inquiries. United States v. Anderson, 704 F.2d 117, 119 (3rd Cir.) cert. denied, 104 S.Ct. 129 (1983).

The colloquy between the judge and the defendant serves both to emphasize the seriousness of the decision to waive the right to trial by jury and to create a clear

2. (continued from previous page)
by all the directors and stockholders of SAI to represent said corporation in the case at bar, pursuant to a resolution dated November 14, 1983. At the time of the waiver in court, Appellant George Pan, the sole stockholder, was present and took part in the discussion. Mr. Dwyer indicated that he had the authority from the current SAI president to waive the jury.

The judge accepted the waiver conditionally, pending the filing of an affidavit of formal authorization from that officer, who at that moment was out of town. The trial court informed Mr. Dwyer that: "If there is some problem with it [the affidavit], we will start over again and call a jury." Appellants did not bring any such problem to the attention of the court.

record of the circumstances of the waiver, establishing that "express and intelligent consent was indeed given." Anderson, supra, at 119, quoting Singer v. United States, 380 U.S. 24 (1935). However, those cases cited by appellants to support their contention, cases in which absence of a sufficient colloquy was cause for reversal, can be distinguished from the case at bar, e.g. a defendant with substantial psychiatric history whose competency to knowingly waive his right was in doubt;[3] a supervisory rule adopted by one circuit requiring an adequate oral inquiry.[4]

3. United States v. David, 511 F.2d 355 (D.C. Cir. 1975).

4. United States v. Delgado, 635 F.2d 889 (7th Cir. 1981).

In the present case, the record is devoid of any evidence or indication that the waiver was coerced or that appellants were incompetent to make a knowing and intelligent waiver. To the contrary, the defendants were a corporation dealing in sophisticated, state of the art computer systems, and its well educated owner and managers. We, therefore, find that the signed waivers and the colloquies prior to the district court's approval fulfilled the requisites for a valid waiver of jury trial.

Appellants take the same position on the court's failure to inquire into their waivers of the right to testify on their own behalf. They do not alleged that they wanted to testify or that they did not know that they could dod so. They simply maintain that the court had an affirmative duty to determine that their decision to

remain silent was intelligent and voluntary. Once again, appellants are misguided.

18 U.S.C. § 3481 does provide for testimony by the accused: "... the person charged shall, at his own request, be a competent witness." (Emphasis supplied). The accused must act affirmatively. While the due process clause of the Fifth Amendment may be understood to grant the accused the right to testify, the "if" and "when" of whether the accused will testify is primarily a matter of trial strategy to be decided between the defendant and his attorney. See Brooks v. Tennessee, 406 U.S. 605 (1972); Hollenbuck v. Estelle, 672 F.2d 451 (5th Cir.), cert. denied, 459 U.S. 1019 (1982).

The instant case is not a situation where the defendants wanted to testify and

were prevented from doing so by the trial court or counsel. Cf. United States v. Poe, 233F.Supp. 173 (D.D.C. 1964), aff'd 352 F.2d 639 (D.C. Cir. 1965); see also Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982). Nor does the record contain anything which would alert the court to a disagreement between attorney and client regarding whether they should take the stand. We are convinced that under the circumstances of the case at bar, there was no error committed in the trial court's failure to interrogate the appellants on this point. There is no constitutional or statutory mandate that a trial court inquire further into a defendant's decision to not testify under the facts here. United States v. Janoe, 720 F.2d 1156, 1161 (10th Cir. 1983), cert. denied, 104 S.Ct. 1310 (1984).

Appellants further contend that their Fifth and Sixth Amendment rights were

violated by the trial court's alleged failure to deliberate before pronouncing its verdict. They claim that there was no deliberation because the court did not recess following closing arguments. In our view, this conclusion is brought about by a misconception regarding the nature of the deliberative process in non-jury trials.

In a jury trial, the jury is actually given early in the trial, some form of the following admonishment:

> FIRST, do not discuss the case either among yourselves or with anyone else during the course of the trial. in fairness to the parties to this lawsuit, you should keep an open mind throughout the trial, reaching your conclusion only after all the evidence is in and you have heard the attorney's summations and my instructions to you on the law, and then only after an interchange of views with the other members of the jury.

(Emphasis supplied). I Devitt and Blackmar, Federal Jury Practice and Instructions,, Chap. 10 § 10.14. This is because the

verdict in a jury trial is the product of all the jurors. Their deliberation may not begin until the judge charges them, because their evaluation of the evidence must be tempered by those instructions and reflect the law governing the action.

This is obviously not the same situation in a trial without a jury. The trial judge has, from the beginning, access to and appreciation of the law applicable to the case. He has judicial training and expertise which members of the jury lack. His decision is an individual one, not that of a group. Appellants do not cite, nor do we find, any cases which prohibit the trial judge from deliberating during the course of the hearings. In this action the judge found in favor of the defendants on six counts at the close of the government's case. There were no allegations by the

appellants that the court did not deliberate at this point. For that matter, judges are called upon throughout trials to weigh evidence and deliberate.

The cases cited by appellants in support of their position deal with situations in which the trial court failed to allow closing arguments or made statements to the effect that the decision would not be influenced by them.[5] We do not find these cases applicable to the instant action.

5. Herring v. New York, 422 U.S. 853 (1975); Spense v. State, 463 A.2d 808 (Md. 1983); United States v. King, 650 F.2d 534 (4th Cir. 1981).

Appellants do not offer any evidence to support a contention that the judge failed to deliberate during the trial and through the closing arguments. To the contrary, the judgment in the case reflects a weighing of each cound individually: SAI was convicted of all the remaining charges, Counts 1-11. George Pan was acquitted on Count 6, and convicted on all other counts. Karen Pan was acquitted on the first three counts and convicted on Counts 4 and 5.

These results clearly militate against appellant's contention that the judge did not "deliberate" before reaching his verdicts.[6] it is, therefore, rejected.

6. To "deliberate" means to weight, to ponder, to consider, to reflect upon. People v. Thomas, 152 P.2d 7 (Cal. 1945).

We must next consider whether the district court improperly admitted witness Frank Toohey's opinion regarding the amount of direct labor costs which were improperly shifted to overhead accounts. Toohey, a senior Defense Contract Audit Agency (DCAA) auditor, testified for the government both and a summary witness and as an expert. Toohey'S credentials and the court's finding of his capacity to testify as an expert witness were not challenged by the defendants. Rule 702 of the Federal Rules of Evicence specifically proves the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as a n expert by knowledge, still, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Rule 704 provides:

> Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In this instance, appellants are objecting to Toohey's figures on the mischarges and the manner in which he calculated the probable amount of

overbilling. The witness detailed to the court the method he employed in reaching these figures. He carefully explained what SAI labor charging records he examined and how he evaluated them. He testified as to how he verified the time-sheet alterations and incorrect ledger postings and that only 75% of the 540 instances in which direct labor costs were shifted to non-labor charges could be verified.

It is well settled that the propriety of receiving expert testimony rests with the sound discretion of the trial court. United States v. Hensel, 699 F.2d 18, 38 (1st Cir.), cert. denied 103 S.Ct. 2431 (1983); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

A review of the record shos that Toohey was completely candid about the method he used in making his calculations.

It was clearly that he could not, from SAI's records, verify a po;rtion of the figures he used in those calculations, but, given the overwhelming confirmation of his observations by other witnesses,[7] we can safely conclude that the trial court did not abuse its discretion by admitting his testimony.

The final contention with which we must deal is appellant's allegation that the trial court erred in denying their motions for judgments of acquittal. In reviewing such a motion, the court must consider the evidence as a whole taken in the light most favorable to the Government, together with

7. The government called twenty-six other witnesses, most of whom were employees or former employees of SAI. Many of them testified as to how they were ordered to alter their own time sheets or those of other employees. Accounting department employees testified that they were directed by the appellants to charge employee's hours to other accounts or to overhead.

all legitimate inferences drawn therefrom to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. United States v. Smith, 680 F.2d 255, 259 (1st Cir. 1982), cert. denied, 104 S.Ct. 173 (1983).

Mr. Toohey testified that in the last months of 1979, he told both George and Karen Pan about the numerous problems he had discovered involving SAI labor accounting practices. Other witnesses who worked for the company testified that in 1980, they were still being directed by the Pans to make alterations sand misbookings of the same type cited by Toohey.

In addition to the Pans' coordination of the mischarging, there was testimony to the effect that the appellants were directly involved in the preparation of the overhead

submission made to the government which contained rates that were inflated through the mischarges. The Pans would discuss these submissions with other employees prior to filing them. An additional witness testified that she was instructed by George Pan to alter materials before turning them over to a DCAA auditor. George Pan also directed the SAI General Manager to withhold documents subpoenaed by the grand jury which would implicate Karen Pan, according to other testimony. Still another witness testified that Karen Pan told her not to provide any information concerning the labor journals to an independent accountant hired to audit SAI's books.

The Government, in proving its case, need not exclude every reasonable hypothesis of innocence, provided the record as a whole

supports a conclusion of guilt beyond a reasonable doubt. United States v. Smith, supra, at 259; United States v. Gabriner, 571 F.2d 48, 50 (1st Cir. 1978). Based upon our review of the record, as indicated above, we conclude that there is more than adequate evidence to support the conclusions reached by the district court.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1561

UNITED STATES OF AMERICA,
Appellee

v.

SYSTEMS ARCHITECTS, INC.,
Defendant, Appellant,

JUDGMENT
Entered: February 22, 1985

This case came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P.Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1564

UNITED STATES OF AMERICA,
Appellee,

v.

KAREN Y. PAN,
Defendant, Appellant

JUDGMENT
Entered: February 22, 1985

This case came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P.Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1565

UNITED STATES OF AMERICA,
Appellee

v.

GEORGE S. PAN,
Defendant, Appellant

JUDGMENT
Entered: February 22, 1985

This case came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P.Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 84-1561

UNITED STATES OF AMERICA,
Appellee

v.

SYSTEMS ARCHITECTS, INC.,
Defendant, Appellant,

No. 84-1564

UNITED STATES OF AMERICA,
Appellee,

v.

KAREN Y. PAN,
Defendant, Appellant

NO. 84-1565

UNITED STATES OF AMERICA,
Appellee

v.

GEORGE S. PAN,
Defendant, Appellant

Before
Coffin, Bownes and Torruella,
Circuit Judges

ORDER OF COURT
Entered May 20, 1985

The petition for rehearing is denied. The following paragraph is hereby added to the slip opinion dated February 22, 1985, issued in the above captioned case at Page 12, before last paragraph:

Appellants' challenge to venue in the District of Massachusetts for Count Three is without merit. The Supreme Court has recognized that venue is a personal privilege which may be waived. Singer v. United States, 380 U.S. 24, 35 (1965). The importance of proper venue has been acknowledged, but it has, nevertheless, been considered to be waived where the indictment or statements by prosecution clearly reveal this defect but defendant fails to object. See United States v. Price, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971). In the case at bar, the appellants

first raised the issue of venue at the close of the government's case. The trial court found that the issue was waived on the grounds that appellants had not objected to venue prior to trial, even though they were aware of the alleged venue defect since the filing of the indictment.[1] We agree.

By the Court:

Francis P.Scigliano

Clerk

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1. George Pan personally delivered the claim to Mr. Luna at the Small Business Administration in Washington, D.C. Pan, therefore knew, when reading the indictment that referred to this act, ,that it had taken place outside of Massachusetts.